



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2020-0644; FRL-9164-02-R8]

Air Plan Approval; Colorado; Denver Metro/North Front Range Nonattainment Area; Nonattainment NSR Permit Program Certification for the 2015 8-Hour Ozone Standard
AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the State of Colorado. The submittal certifies that the State of Colorado has fulfilled, through previous SIP revisions, Nonattainment New Source Review (NNSR) Permit Program requirements under the 2015 8-hour ozone National Ambient Air Quality Standards (NAAQS) for the Denver Metro/North Front Range (DMNFR) area. The State of Colorado submitted the certification to meet the nonattainment requirements for Marginal ozone nonattainment areas (NAAs) for the 2015 8-hour ozone NAAQS. The EPA is taking this action pursuant to sections 110, 172, 173, and 182 of the Clean Air Act (CAA).

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2020-0644. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <http://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Matthew Lang, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD-IO, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, telephone number: (303) 312-6709, email address: lang.matthew@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

I. Background

The background for this action is discussed in detail in our November 2, 2021 proposal.¹ In that document we proposed to approve a NNSR permit program certification for the DMNFR Marginal NAA because the certified NNSR permit program was prepared in accordance with requirements of sections 172(c)(5) and 173 of the CAA and fulfills the specific minimum SIP requirements of 40 CFR 51.165. The EPA is finalizing its proposed approval of the NNSR certification submitted by the State of Colorado for the DMNFR Marginal NAA under the 2015 8-hour ozone NAAQS. With this final rulemaking Colorado will have met the NNSR permit program requirement stemming from the Marginal nonattainment designation of the DMNFR area.

EPA held a 30-day comment period on the proposed rulemaking beginning on November 1, 2021 and closing on December 2, 2021. We received comments on the proposal from two commenters. One individual expressed support for our proposed rulemaking. We also received comments from the Center for Biological Diversity (CBD) claiming that EPA must hold a new comment period and that Colorado’s SIP is inadequate with respect to NNSR permit program requirements. We thank the commenters and our responses to the comments received are included below.

II. Response to Comments

Commenter 1

¹ Approval and Promulgation of Implementation Plans; Colorado; Denver Metro/North Front Range Nonattainment Area; Nonattainment NSR Permit Program Certification for the 2015 8-Hour Ozone Standard, 86 FR 60434 (November 2, 2021).

One commenter expressed support of the proposed approval and provided a general suggestion that sources be given time to make any needed changes to practices.

Response: With respect to the commenter's concern that sources be given time to make changes to practices, we note that this rulemaking does not impose any additional regulatory requirements on sources that would take time to implement. NNSR is a preconstruction review program that only applies to new sources and major modifications at existing sources. This action solely approves the certification submitted by the State of Colorado explaining that the existing federally-approved NNSR permit program meets the requirements of 172(c)(5) and 173 of the CAA and fulfills the specific minimum SIP requirements of 40 CFR 51.165 for NNSR permit programs for the 2015 8-hour ozone NAAQS.

Comments From the Center for Biological Diversity

Comment 1

CBD asserts that EPA must hold a new comment period since EPA did not include the regulatory provisions that it is proposing to approve in the docket.

Response: In this rulemaking, EPA proposed to approve a NNSR permit program certification that was submitted by Colorado and which certified that the State's existing SIP-approved NNSR permit program meets the marginal nonattainment requirement for implementation of a NNSR permit program. As such, our action does not approve any actual revisions to the text of the Colorado SIP, as was stated in our proposed rulemaking. The provisions which have been approved by EPA into the Colorado SIP via past rulemaking actions are publicly available, and were publicly available at the time of our proposed rulemaking, on EPA's webpage showing approved statutes and regulations in the Colorado SIP.² Links to the EPA actions that have most recently approved revisions to each section of the Colorado SIP are

² See <https://www.epa.gov/sips-co/epa-approved-statutes-and-regulations-colorado-sip>. We note that this compilation of EPA-approved statutes and regulations had not yet been updated at the time of our proposed rulemaking to reflect the revisions to Colorado's NNSR program that were approved by EPA in 2019 at 84 FR 18991 (May 3, 2019). However, that action (84 FR 18991) was specifically referenced in our notice of proposed rulemaking as being the most recent approval of revisions to Colorado's SIP-approved NNSR permit program.

available at this EPA webpage and can also be found at 40 CFR part 52, subpart G.³

Furthermore, the provisions of Colorado's SIP that the state certified as meeting the requirements for NNSR programs for new major sources and major modifications at existing sources in ozone nonattainment areas are specifically listed in the "Clean Air Act Elements Table" provided at attachment 7 of Colorado's SIP submittal. Attachment 7 of the submittal was referenced in the proposed rulemaking as being the NNSR provisions that Colorado is certifying. See 86 FR 60435. According to that attachment, the relevant SIP provisions for the NNSR permit program are found in sections I, II, and V of Regulation 3, Part D of the Colorado Code of Regulations (CCR). Instead of approving new revisions to the text of the existing SIP, this action approves those existing regulations which have already been incorporated into the SIP as meeting NNSR permit program requirements for ozone NAAs under the 2015 8-hour ozone NAAQS. Since no revisions to the Colorado SIP were submitted by the State and because, as mentioned previously, the existing SIP is available to the public and specific sections of the submittal highlighted the relevant provisions in the SIP, it is not necessary to include a copy of the SIP-approved NNSR permit program in the docket of the proposed rulemaking. Furthermore, it is not necessary to include a copy of the SIP-approved NNSR permit program in the docket since the opportunity for public comment was previously provided on each occasion that revisions to the NNSR permit program were approved into the SIP. This is consistent with other actions taken by EPA in approving certification SIP submittals to meet the 2008 and 2015 Marginal area SIP revision requirement for NNSR permit programs in which the State submittals and EPA approvals make reference to the relevant State regulations that are already federally approved while noting the most recent approval of revisions to the NNSR provisions.⁴

Comment 2

³ See <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-C/part-52/subpart-G>.

⁴ Air Plan Approval; Texas; Clean Air Act Requirements for Nonattainment New Source Review and Emission Statements for the 2015 Ozone National Ambient Air Quality Standards, 86 FR 50456 (September 9, 2021). Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Nonattainment New Source Review Requirements for 2008 8-Hour Ozone Standard, 84 FR 5598 (February 22, 2019).

CBD asserts that EPA must disapprove Colorado's NNSR permit program certification because the NNSR program does not address the designation of northern Weld County as nonattainment given that this designation is effective beginning on December 30, 2021.

Response: This comment concerns the applicability of Colorado's NNSR permit program to the portion of Weld County that was newly designated as nonattainment as part of the DMNFR NAA, effective on December 30, 2021. Colorado's SIP-approved NNSR program applies generally to all ozone NAAs within the State of Colorado.⁵ Thus, upon the effective date of designation of northern Weld County as nonattainment through inclusion in the DMNFR NAA, the existing NNSR permit program applies by operation of law to new major sources and major modifications in the portion of northern Weld County that has been newly designated as nonattainment. Since the 2015 nonattainment boundary was remanded without vacatur, the NAA boundary that did not include northern Weld County was effective at the time of publication of our proposed rule. Therefore, our proposed rule noted that to the extent that EPA's designation changes on remand, Colorado will be required to address the change as part of a future SIP revision. Upon further review, EPA acknowledges that the footnote in EPA's proposal that commenters reference (footnote 6 at 86 FR 60435) could be clearer.⁶ That footnote was not intended to speak directly to the NNSR permit program requirement, but rather was intended to make a general point that additional supplements or revisions could be needed to fulfill Marginal area SIP revision requirements should a change in the NAA boundary be made final. This footnote is consistent with the language used in EPA's final action regarding designations for remanded areas at 86 FR 67869.⁷ Since EPA interprets Colorado's NNSR permit program as being generally applicable to any ozone NAA within the State, it became applicable to the

⁵ 5 CCR 1001-5:3D.II.A.25.b; 5 CCR 1001-5:3D.V.A.3.

⁶ Footnote 6 at 86 FR 60435 of EPA's proposal is copied here for reader convenience: The EPA excluded part of Weld County from the DMNFR NAA, but that designation was remanded without vacatur in *Clean Wisconsin v. EPA*, 964 F.3d 1145, 1167–69, 1177 (D.C. Cir. 2020). To the extent the EPA's designation with respect to Weld County changes on remand, CO will be required to address the change in a future SIP revision.

⁷ Additional Revised Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards: El Paso County, Texas and Weld County, Colorado, 86 FR 67864 (November 30, 2021).

newly-designated portion of Weld County on the effective date of this designation (Dec. 30, 2021). There is no need for additional revisions to the existing NNSR permit program to make it applicable to the area of northern Weld County designated as nonattainment in 2021.⁸

Comment 3

CBD asserts that EPA must disapprove Colorado's certification of the state's NNSR permit program because the program does not ensure that minor sources in the DMNFR NAA will not cause or contribute to increment violations.

Response: The NNSR permit program requirements that are the focus of this action are specific to new major sources and modifications at existing sources in ozone NAAs and include the requirements that were promulgated in the "Phase 2 Rule" implementing the 1997 8-hour ozone NAAQS and which are listed in our proposed rulemaking.⁹ Therefore, since none of the requirements for NNSR major source permit programs at 40 CFR 51.165 concern contributions to consumption of PSD increment, this comment falls outside the scope of this proposed rulemaking. Furthermore, we again note for clarity that the EPA is not approving any revision to the Colorado SIP. Instead, EPA is approving Colorado's certification that the existing SIP-approved NNSR permit program continues to meet the minimum requirements for NNSR permit programs in Marginal ozone NAAs under the 2015 8-hour ozone NAAQS. Colorado's SIP certification did not, and need not, address the PSD or minor source permitting requirements under 40 CFR 51.166 or 51.160. Further, there is no PSD increment for ozone in section 51.166(c).

Comment 4

⁸ EPA acknowledges that 2021 revised designations action amending the boundary line for Denver Metro/North Front Range NAA to include the northern portion of Weld County has been challenged in court. *Board of County Commissioners of Weld County, CO v. EPA*, No. 21-1263 (D.C. Cir., Dec. 15, 2021). On March 15, 2021, the court denied Petitioners' request to stay the Agency's revised designations action. If the court eventually takes an action that results in northern Weld county's exclusion from the Denver Metro/North Front Range NAA, then Colorado's existing NNSR permit program would no longer apply there until such time northern Weld County is again part of an ozone nonattainment area.

⁹ Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard-Phase2; Final Rule to Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter and Ozone NAAQS; Final Rule for Reformulated Gasoline, 70 FR 71612 (November 29, 2005).

CBD asserts that EPA must disapprove Colorado's certification of their NNSR permit program because the program provides for exclusions of temporary emissions and emissions from internal combustion engines on vehicles from being used in the determination of whether a source is a major stationary source subject to NNSR permitting. CBD claims these exclusions are not allowed by the CAA.

Response: As referenced by the commenter, the definition of potential to emit at 40 CFR 51.165(a)(1)(iii) excludes secondary emissions in determining the potential to emit of a stationary source. Secondary emissions are defined at 40 CFR 51.165(a)(1)(viii) to include emissions which would occur because of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. NNSR permitting concerns continuous operating emissions of a stationary source and not temporary emissions or emissions associated with construction. Therefore, the exclusion of emissions from temporary activities contained at Section II.A.25.f of Regulation 3, Part D in the CCR is allowable per the definition of secondary emissions and exclusion of secondary emissions under the definition of potential to emit at 40 CFR 51.165. The exclusion of emissions from internal combustion engines on any vehicle at Section II.A.25.f of Regulation 3, Part D is appropriate since mobile source emissions from nonroad mobile and on-road mobile sources are not considered as part of the operating emissions of a stationary source. However, under the definition of "Nonroad engine" at 40 CFR 1068.30 an internal combustion engine is not a nonroad engine if it remains or will remain at a location for more than 12 consecutive months and would instead become a stationary engine as specified by 40 CFR 1068.31(e)(1). This definition is reflected in Section I.B.31.b.(iii) of Regulation 3, Part A of the CCR which is incorporated into the SIP.¹⁰ Mobile source emissions are regulated by Title II of the CAA which includes emissions standards for moving sources and therefore mobile source emissions are not included in the determination of whether a stationary source is a major source for NNSR

¹⁰ 5 CCR 1001-5:3A.I.B.31.b.(iii).

purposes. Section II.G of Appendix S to 40 CFR part 51, which set forth EPA’s interpretive ruling on preconstruction review, details that “since EPA’s authority to perform or require indirect source review relating to mobile sources regulated under Title II of the Act (motor vehicles and aircraft) has been restricted by statute, consideration of the indirect impacts of motor vehicles and aircraft is not required under this Ruling.” We therefore disagree with the assertion by the commenter that the exclusion of temporary emissions and emissions from internal combustion engines on vehicles are not allowable in the determination of whether a source is major with respect to NNSR permitting.

Comment 5

CBD asserts EPA must disapprove Colorado’s certification of their NNSR permit program because the program provides for exemptions relating to offset requirements not allowed under the CAA or EPA’s regulations. Specifically, the commenter claims that the following exemptions from offset requirements that are located in Regulation 3, Part D are not allowed: portable sources that will relocate outside a NAA in less than one year, pilot plants that operate an aggregate of less than six months, construction phases of a new or modified building/facility/structure/installation, temporary processes or activities of less than one year in duration, and sources undergoing fuel switches.¹¹

Response: Appendix S to 40 CFR part 51 is a codification of EPA’s Emissions Offset Interpretive Ruling on the preconstruction review requirements for stationary sources under 40 CFR part 51, subpart I. Section IV.B of Appendix S contains exemptions consistent with those that the commenter objects to. These exemptions include temporary emission sources such as portable facilities that will be relocated outside of the NAA after a short period of time, pilot plants, and emissions resulting from the construction phase of a new source. We highlight that this Appendix S provision concerning offset exemptions for temporary emissions from construction phases does not prohibit reviewing authorities from concluding that emissions

¹¹ 5 CCR 1001-5:3D.V.A.8.a(i)(A)-(E)

associated with construction phases exceeding a period of one year are temporary emissions. The language of section IV.B of Appendix S is general enough to allow the reviewing authority to exempt emissions resulting from a construction phase exceeding one year from offset requirements. Section IV.B of Appendix S also includes an exemption for sources which must switch fuels due to lack of adequate fuel supplies or where a source is required to be modified as a result of EPA regulations. This exemption applies only if an applicant has demonstrated that it has made its best efforts to obtain sufficient emission offsets and that efforts were unsuccessful, the applicant has secured all available emission offsets, and the applicant will continue to seek the necessary emission offsets and apply them when they become available. Appendix S currently serves as a NNSR permitting program that may be applied by states that do not have an approved NNSR program in their SIP or lack a particular element of such a program. The omission of the Appendix S offset exemptions at 40 CFR 51.165 does not preclude the inclusion of the same exemptions in the Colorado SIP. The Emissions Offset Interpretive Ruling reflects a longstanding EPA interpretation of the CAA. EPA does not consider it appropriate to allow states without an approved NNSR program to apply the exemptions in Appendix S, while denying states who have taken on the task of developing an NNSR program for EPA approval the same opportunity to implement exemptions that EPA has previously-determined to be permissible under the Act. The exemption from offset requirements at Section IV.B of Appendix S to 40 CFR part 51 specifically for emissions resulting from the construction phase of a new source was most recently recognized as an appropriate exemption in a permit issued by EPA for the South Fork Windfarm on the Outer Continental Shelf (OCS).¹² Therefore, we disagree with the claim made by the commenter that the exemptions at section V.A.8 of Regulation 3, Part D are not allowed under the CAA or EPA's regulations since, as detailed previously, these exemptions are in section IV.B of Appendix S to 40 CFR part 51.

¹² See EPA Response to Comments for South Fork Windfarm OCS Air Permit at p. 14. Available online at <https://www.epa.gov/system/files/documents/2022-01/sfw-response-comments-final-permit-ocs-r1-04.pdf>.

III. Final Action

The EPA is finalizing approval of the NNSR permit program certification submitted by the State of Colorado because the certified NNSR Permit Program was prepared in accordance with requirements of sections 172(c)(5) and 173 of the CAA and fulfills the specific minimum SIP requirements of 40 CFR 51.165.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the

finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 8, 2022,

KC Becker,
Regional Administrator,
Region 8.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart G—Colorado

2. In §52.320, the table in paragraph (e) is amended by revising the center heading “Maintenance Plans” and adding the entry “Ozone (8-hour, 2015) DMNFR NNSR Certification” at the end of the “Denver Metropolitan Area” subheading to read as follows:

§52.320 Identification of plan.

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(e) * * *

Title	State effective date	EPA effective date	Final rule citation/date	Comments
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Maintenance and Attainment Plan Elements						
*						
Denver Metropolitan Area						
*						
Ozone (8-hour, 2015) DMNFR NNSR Certification	7/6/2020	[insert date 30 days after date of publication in the Federal Register]	[insert date of publication in the Federal Register], [insert Federal Register citation]			
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[FR Doc. 2022-10211 Filed: 5/12/2022 8:45 am; Publication Date: 5/13/2022]